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No. 83-13

IN THE

Supreme Court of the United States

October Term, 1983

DARCIA M. FLEURY, DONALD L. FLEURY, SUSAN ADELE FLEURY, and DARLEEN ANN FLEURY,

Petitioners,

vs.

HARPER & ROW, PUBLISHERS, INC, a Foreign Corporation; MANNITOU ENTERPRISES UNLIMITED, INC., a Foreign Corporation, and LINDA GOODMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Errata.

FLEURY, vs. HARPER & ROW, PUBLISHERS, INC., *et al.*

No. 83-12.

Addendum to Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Statement Per Rule 28.1

Harper & Row, Publishers, Inc., a Delaware corporation, has no parent company. All its subsidiaries are wholly owned. It does have an affiliate:

Fitzhenry & Whiteside, Ltd., Don Mills, Ontario, Canada

Mannitou Enterprises, Unlimited, Inc., has no parent company and no subsidiaries. It has an affiliate:

Mannu Unlimited, Inc.

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HARPER & ROW, PUBLISHERS, INC., a Foreign Corporation; MANNITOU ENTERPRISES UNLIMITED, INC., a Foreign Corporation, and LINDA GOODMAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents Harper & Row, Publishers, Inc., Mannitou Enterprises Unlimited, Inc., and Linda Goodman respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 698 F.2d 1022 (9th Cir. 1983), and is Appendix A (pp. A 1 to A 14) to the Petition for Writ of Certiorari.

The questions attempted to be raised and the opinion of the Court of Appeals both show that this case cannot qualify for review by certiorari. 28 U.S.C. 1257; U.S. Supreme Court Rule 20.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

Introduction.
(Re: Petition, pp. 1-12).

Of the nine "questions presented by the Petition," questions 3, 4, 5 and 7 are clearly questions of state law construction only. Questions 1 and 2 purport to raise "due process" questions. These were not raised in the trial court. The remaining three questions, numbers 6, 7 and 8, are specious. The Petition deals with all nine purported questions under four headings, and we do the same below in this brief.[1]

A clear and concise statement of the undisputed facts[2] in this case is in the Court of Appeals opinion at A2 and A3. They may be summarized in a few sentences. Harper & Row shipped 10,000 copies of the book on November 10, 1978 and 10,000 copies thereafter each working day to distributors and bookstores in various cities throughout the United States. 30,000 copies[3] had been shipped by November 14, 1978 and books were in display for sale in the Harper & Row Bookstore and "in the major bookstores on Fifth Avenue [New York] before November 16, 1978." (A3) Petitioners filed their action on November 16, 1979, in the Southern District of California.

The issue before the District Court and thereafter before the Court of Appeal was whether petitioners' claim was

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[1]Petitioners have also proliferated the "constitutional and statutory provisions" allegedly involved in this case. (Petition, pp. 2-4) In fact, the statutes involved are simply the California Statute of Limitations (California *Civil Code* §340(3)) and the Uniform Single Publication Pact (California *Civil Code* §§3425.1-3425.4)

[2]These are the words of both courts below: "the undisputed facts of record" (A2); "the uncontradicted affidavits on file" (A16); "the affidavits on file show, without contradiction" (A19).

[3]Most books published by Harper & Row have printings which do not exceed 10,000 copies.

barred by the California Statute of Limitations and the Uniform Single Publications Act.[4] The careful opinions of both courts below show that petitioners' claim was barred. The book was generally distributed to the public and was beyond the control of the publisher and on sale before November 16, 1978. The action was therefore time barred (A 8, 19, 20, 22) by the California one-year statute of limitations. (California *Civil Code* 340(3), 3425.4.)

The construction of California's Statute of Limitations raises no federal question, and certainly none of substance within the meaning of Rule 20. As this Court recently stated:

> "The appellants' objection to the state Supreme Court's application of state law does not raise a federal question appropriate for review by this court. See *Patterson v. Colorado*, 205 U.S. 454, 51 L.Ed. 879, 27 S.Ct. 556 (1907)." *Agins v. Tiburon* (1981) 447 U.S. 235, 259, footnote 6.

To the same effect: *Woods v. Neirsteimer*, 328 U.S. 210, 214 (1946); *Utley v. St. Petersburg*, 292 U.S. 106, 111 (1934) reh'g. den. 292 U.S. 604; *Moffett v. Robbins*, 81 F.2d 431, 436 (10th Cir. 1936).

The construction given the California Statute of Limitations by the state and federal courts is particularly appro-

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[4]The sixth alleged question presented by the Petition is whether defendants were estopped as to the publication date because the application for copyright was for a December 25, 1978 date. The facts of the matter are that the date of December 25, 1978, does not appear in the copyright notice in the book and that petitioners themselves received a copy of the book at least 10 days before December 25, 1978. They then delayed at least eleven months before filing suit. In any event, except for a brief reference in the "Statement of the Case" (Petition p. 6), the Petition does not argue this question, which clearly pivots on the California law of estoppel and is inappropriate for review here. The alleged issue of estoppel was fully canvassed below. There was no contradiction of the fact that the "official" publication date like the date on magazines, is irrelevant to when actual publication in fact occurs and that actual publication in this case occurred no later than November 13, 1978.

priate because the California Courts have held:

> "Statutes of Limitations are not disfavored in the law. To the contrary, they are favored in the law because they promote desirable social ends and give security and stability to human affairs. (*Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982)." *McGee v. Weinberg*, 97 Cal.App.3d 798, 804, 159 Cal.Rptr. 86 (1979).

That the precise question has not been decided by the California Supreme Court does not aid Petitioners. The most recent ruling is that of the California Court of Appeal. *McGuinness v. Motor Trend Magazine*, 129 Cal.App.3d 59 (1982). That opinion and all of the relevant California law were reviewed in this case by the District Court and by the Court of Appeal. *MacGregor v. State Mutual Life Insurance Co.*, 315 U.S. 280 (1942) strikes this case directly:

> "No decision of the Supreme Court of Michigan, or of any other court of that state, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan Federal Judge of long experience and by three Circuit Judges whose circuit includes Michigan." (315 U.S. at 281).

See also *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707, 708 (1949), and *Helvering v. Stuart*, 317 U.S. 154, 163 (1942): "Without a definite conviction of error in the conclusion [of the lower Federal Courts concerning state law], this court will not reverse that judgment." *Reitz v. Mealey*, 314 U.S. 33, 39 (1941): "In any case we should accord great weight to the District Court's view of New York law."

The Court of Appeal here followed this rule and, indeed, brought its own scrutiny to the question. The Petition raises

no question of substance here.[5]

There is no federal statute of limitation for defamation and the statutes of the several states vary. The time limitations are properly left to the individual states, no less than is the standard of care which a plaintiff must prove defendant breached before there is liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1973).

Statutes of limitations vary from extremely short periods to comparatively long ones. The tolling provisions in the different states are not the same. The construction of their limitations statutes is properly one for the individual states and does not raise a federal or constitutional question. This is particularly true in the field of defamation. *Paul v. Davis* (1976) 424 U.S. 693.[6]

Petitioners' statement (Petition p. 11) that "Issues similar to those involved in this case are already before the Court

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[5]Petitioners complain that *United States v. Gutterman*, 701 F.2d 104 (9th Cir. 1983) shows that the Ninth Circuit "does not always yield its judgment in diversity cases to a District Court, attempting to 'find' state law." (Petition, p. 12) The Court of Appeals here, however, did not "yield its judgment" or "refuse to perform its constitutional duty." *Gutterman*, a legal malpractice case where all the California cases were contrary to the District Court's determination, illustrates that even under the "substantial deference" approach, the Ninth Circuit is free to rectify error. That the Court of Appeal in fact independently examined the record and the law is abundantly clear from its opinion.

[6]In *Paul v. Davis*, the Court held that no cause under 42 U.S.C. 1983 was stated where the police had defamed plaintiff.

> Respondent [plaintiff] in this case, cannot assert denial of any right vouchsafed to him by the state and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publication, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property interest protected by the due process clause." (424 U.S. at 712)

Cases to the same effect are numerous. E.g., *Smith v. Klecker* (9th Cir. 1977) 554 F.2d 848; *Everett v. City of Chester* (DC ED Pa. 1975) 391 F.Supp. 26, 28; *Shumate v. People of New York* (DC NY 1974) 373 F.Supp. 1166, 1168; *Rosenberg v. Martin* (2nd Cir. 1973) 478 F.2d 520, 524, f/n 4: A claim for defamation "does not implicate any federally-protected rights and is not cognizable under 42 U.S.C. 1983."

in *Keeton v. Hustler Magazine, Inc.*, 103 S.Ct. 813, [___ U.S. ___ (1983)]" is inaccurate. The Federal District Court's dismissal in *Keeton* was "on the ground that the federal constitution — in particular the due process clause of the Fourteenth Amendment — would not permit New Hampshire to exercise jurisdiction over defendants in this action." *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982). There is no jurisdictional issue in our case, and there was no construction of a state statute of limitations in *Keeton*; the premise of *Keeton* was that the New Hampshire statute of limitations had not run and no discussion was devoted to it.

Similarly, *Factors, etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2nd Cir. 1981) cert. den'd. 102 S.Ct. 1973 (1982) and *Factors, etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 13 (2nd Cir. 1983) have nothing to do with the issue here. This is especially true of its dissenting opinion on which petitioners rely. (Petition p. 12)

We turn now to Petitioners' arguments.

ARGUMENT.

I.

There Is No Due Process Issue in This Case. Petitioners Received "The Full Appellate Procedure 'Due' Them Under the Constitution and Laws of the United States."

(Re: Petition, pp. 13-17).

Under their heading I A, petitioners argue that the District Court reached an erroneous result under California law. Their contention is without merit. See discussion of California cases, *infra*. Their contention that the California Statute of Limitations as construed by its courts and by the courts below "arbitrarily stripped [them] of their cause of action, a valuable property right," (Petition, p. 15) was not made in the trial court — not even on the motion to alter or amend the judgment. Since the alleged constitutional issue was not raised in the District Court, the Court of Appeals was correct not to consider it on its alleged merits. (Opinion, A 11) The question is clearly not appropriate for review in the Supreme Court.

In any event, the argument provides no basis for a federal question or for an asserted violation of due process. As stated in *Wood v. Chesborough*, 228 U.S. 672, 677 (1913), ". . . Certainly the application of laches and the statute of limitations does not present a federal question." *Preston v. Chicago*, 226 U.S. 447, 450 (1913) and cases cited above p. 3.

Petitioners' reliance on *Brinkerhoff-Faris Trust And Savings Co. v. Hill*, 281 U.S. 673 (1930) (Petition, p. 13) is grossly misplaced. In that case the petitioner was denied any access to a hearing by the state court's construction and retroactive application of a statute to petitioners' case in direct conflict with its prior opinion. That is, the petitioner

in *Brinkerhoff-Faris*, as the Court stated, was in this position:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction." (281 U.S. at 679).

That is not this case. The courts were always open to petitioners. They simply sat on their rights and filed their action too late. The state court's established interpretation of its statute of limitation has barred petitioners' claim. This raises no due process question whatsoever, and the substance of the issue — the interpretation of the state court's statute — is not a subject for this court's review: In *Brinkerhoff-Faris*, the Court stated:

> "It is true that the courts of a state have a supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered a erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court." (281 U.S. at 681, footnotes omitted).

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), similarly does not support petitioners' claim that they "were arbitrarily stripped of their cause of action, a valuable property right." (Petition, p. 15) *Logan* has nothing to do with our case. In *Logan* a state administrative agency, by its own error, deprived an employee of the minimal procedural protections which are indispensable in wrongful discharge cases. No action by the State of California and no invidious classification in its statutes has led to a judgment in this case

without a hearing. Rather, "an extensive record" (Opinion, p. A-12) was made; full argument was had; a motion to alter or amend the judgment was made; and a full appeal has been provided.

Petitioners' argument under heading I B (Petition, pp. 15-17) has even less to recommend it. The opinion of the Court of Appeals does not show any absention of its decision making powers, or, to use petitioners' hyperbole, an abandonment of "its constitutional obligation to state what the law is." (Petition, p. 16).[7]

As shown above (see cases cited on pp. 4) the Court of Appeals followed the proper rule: "We accord 'substantial deference' to the district judge's interpretation or construction of the law in the state in which he sits." (Opinion, p. A 6) Further, the opinion shows that the Court of Appeals itself reached the same conclusion as the District Court after a most careful review of the record and the law. See especially pp. A-7 through A-12.[8]

Petitioners cite *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and *United States v. Singleton*, 702 F.2d 1159 (D.C.

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[7]Petitioners' citation to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, and *United States v. Nixon*, 418 U.S. 683, 705, emphasizes the lack of truly pertinent authority for their position. Similarly, *Meredith v. Winter Haven*, 320 U.S. 228 (1943) and *Williams v. Green Bay and W. R. Co.*, 326 U.S. 549 (1946), (Petition, pp. 15-16) are irrelevant here.

[8]The Court of Appeals gives its own answer to the question, "if this action had been commenced on November 14, 1979, would it have been prematurely brought?" (P. A-9) It renders its own decision that petitioners' argument that new printings were a republication is without merit. It categorically states in response to petitioners' argument that defendants are "estopped," "This is not the law. The precedents with almost complete uniformity hold that publication occurs at the time of actual communication of the libel, not the date on the cover of the newspaper, magazine, or other printed matter." (pp. A-9 - A-10) The Court of Appeals gives its own, not the trial court's analysis of the *Dominiak* case; and the Court of Appeals states its own reasons why the "rule of discovery" does not apply to the kind of publication involved in this case. (p. A-11)

Cir. 1983) for the proposition, "It is axiomatic that the standard of review utilized by an appellate court determines the outcome of the litigation." (Petition p. 17) *Pullman-Standard*, of course, did not permit the appellate court to make its own determination based upon the entire record, but required the appellate court to adhere to the "clearly erroneous" standard of review when reviewing the District Court's finding of fact of no discriminatory intent. *Singleton*, a criminal case dealing with a motion for judgment of acquittal, simply has nothing to do with the issues in this case.

II.

California Code of Civil Procedure 340(3) as Construed by the California Courts and by the Federal Courts Below, Does Not Violate the Due Process Clause of the Fourteenth Amendment.

(Re: Petition, pp. 18-20).

As the Petition itself (p. 19) points out, Petitioners did not make a due process argument in the District Court. The Court of Appeals properly did not consider the contention made for the first time on appeal. Opinion, p. A-11, citing *Hormel v. Helvering*, 312 U.S. 522 (1941); *Frommhagen v. Klein*, 456 F.2d 1391 (9th Cir. 1972); *Hammerquist v. Clarke's Sheet Metal, Inc.*, 658 F.2d 1319 (9th Cir. 1981).[9] Neither should this Court. *G. D. Searle Co. v. Cohn*, 455 U.S. 404, 455 (1982).

The contention is, in any event, without merit. The cases petitioners cite (*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314 (1950); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)) deal with the due process

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[9]*Malandus v. Merrill Lynch, etc.*, 703 F.2d 1152, 1173 (10th Cir., 1983) (Petition p. 20) is not contrary. In this case the Ninth Circuit properly refused to consider a meritless due process argument raised for the first time on appeal.

requirements that defendants be given adequate notice of a suit. They have nothing to do with when a statute of limitations may commence to run, nor with how short the statute may be. A state may constitutionally have a statute of limitations of one month, six months, or any other period, and specific notice of the event and of the impact of the statute on property rights is not required for the statute of limitations to take effect. In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), this Court made clear that a self-executing statute of limitations is not unconstitutional. The Court stated:

> "As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding."

III.

The Rule That a Book Must Be "On Sale to the Public at Bookstores Throughout the Nation" for the Period of Limitations to Commence Under the Uniform Single Publication Act Is Not the Rule in California or Anywhere Else.

(Re: Petition, pp. 20-23).

Petitioners' contentions under their heading III are fully answered above and by the opinions in this case. The Court of Appeals canvasses the authorities urged by petitioners

and deals expressly with *Dominiak v. National Enquirer*, 439 Pa. 222, 226 A.2d 626 (1970).

Petitioners' reliance upon *McGuinness v. Motor Trend Magazine*, 129 Cal.App.3d 59, 180 Cal.Rptr. 784 (1982) is misplaced. In *McGuiness*, the alleged defamation occurred in an issue of Motor Trend Magazine. The magazine bore the date "August 1975;" the general release date or on sale date was July 24, 1975; and the court specifically noted that, "The August 1975 issue reached subscribers *in Florida, Iowa, New Jersey and Washington* on July 19, July 22, July 18 and July 17 of 1975." There was no reference to when the magazine went on sale or reached subscribers in California. Plaintiff filed his complaint on July 29, 1976. A Summary Judgment for defendants on the ground of statute of limitations, *Civil Code* 340 (3), was affirmed. The argument of plaintiff in *McGuiness* was substantially identical to plaintiffs' argument here:

> "To avoid the bar of the statute of limitations, plaintiff argues (1) that he should be entitled to rely upon the cover date of the magazine [in our case, on the 'copyright date' or 'official publication date'] or (2) that the statute of limitations should not be deemed to have commenced until plaintiff discovered the libel. Neither contention has merit."

As to plaintiff's first contention, the Court stated:

> "There is no basis for concluding that by virtue of the date placed on the cover of the magazine defendants are estopped to raise the statute of limitations or are

guilty of fraudulent concealment which tolls the statute."[10]

As to plaintiff's second contention, the California Court of Appeal held that cases where "the libel was committed in an inherently secretive manner . . . have no application to a public libel in a nationally distributed magazine widely available to the public, including the plaintiff." As in *McGuiness*, in this case "there was no concealment of the defamation." (*Ibid.*) *See also Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895-896, 118 Cal.Rptr. 370 (invasion of privacy cause barred one year after initial publication of textbook; plaintiff's lack of knowledge of publication held immaterial).

Similarly, *Khaury v. Playboy Publications, Inc.*, 430 F.Supp. 1342 (S.D. N.Y. 1977) compels the result reached in the case at bar. As here, the actual publication date and not the date on the issue of the magazine was held to be conclusive; the irrevocability of the widespread distribution and the fact of availability for sale to the public determine the publication date.

Both *McGuinness* and *Khaury* were argued by both parties in the Court of Appeals.

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[10]The Court cited the following cases in support of its holding:
Belli v. Roberts Brothers Furs, 240 Cal.App.2d 284, 49 Cal.Rptr. 65 (1966).
McGlue v. Weekly Publications, Inc. (D.C. D. Mass. 1946) 63 F.Supp. 744.
Tocco v. Time, Inc. (U.S. D.C. E.D. Mich. S.D. 1961) 195 F.Supp. 410.
Khaury v. Playboy Publications, Inc. (U.S. S.D. N.Y. 1977) 430 F.Supp. 1342.
Zuck v. Interstate Publishing Corp. (2nd Cir. 1963) 317 F.2d 727.
Stella v. James J. Farley Association (Supreme Court 1963) 204 Misc. 998, 122 N.Y.S.2d 322, 284 A.D. 873, 135 N.Y.S.2d 234.

IV.

Contrary to Petitioner's Argument, Continuous Printing of the First Edition of a Book Does Not Extend the Statute of Limitations.

(Re: Petition, pp. 23-25).

The record below was categorical and uncontradicted that the printings in 1978 and 1979 were continuous printings of the first hard cover edition of the book. As the Court of Appeals stated (p. A-9), such printings "are a single publication . . . This result is particularly clear in California . . ." The Court correctly cites to *Kanarek v. Bugliosi*, 108 Cal.App.3d 332, 166 Cal.Rptr. 526, 529 (1980); *Belli v. Roberts Brothers Furs*, 240 Cal.App.2d 284, 49 Cal.Rptr. 625 (1966); *Gregoire v. G. P. Putnam's Sons*, 228 N.Y. 119, 81 N.E.2d 45 (1948). See also Comment d to 577a, Single and multiple publications, Restatement, Torts 2d, and *Barres v. Holt, Rinehart and Winston, Inc.*, 131 N.J. Super. 371, 330 A.2d 38, aff'd 141 N.J. 563, 359 A.2d 501 (1976), aff'd 74 N.J. 461, 378 A.2d 1148 (1977).

The language quoted by petitioners from *Johnson v. Harcourt, Brace, Javanovich, Inc.*, 43 Cal.App.3d 880, 892-896, 118 Cal.Rptr. 370 (1974) (Petition, pp. 23-24) is not in the slightest contrary to the above. The California court was there talking about a possible reprinting more than 9 years after the original publication of the defendant's book.

Petitioners' reliance on *Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962) is misplaced. *Wheeler* stands alone in its interpretation of the Uniform Single Publication Act and in any event, there was no showing in *Wheeler* that the printings which there occurred were part of a continuous process of printing and distribution of the first edition of the book. That is the clear and uncontradicted evidence in this case.

CONCLUSION.

The Petition presents a classic example of a case which does not qualify for or merit review by certiorari. The Petition should be denied.

Respectfully submitted,

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